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Environmental Accountability and Public Involvement

LEROY PADDOCK*

The phrase “environmental accountability” is not commonly used in the United States; the concept of “accountability” in U.S. environmental law is probably most closely associated with enforcement programs. This paper uses the phrase to encompass a wide range of mechanisms—from enforcement to public participation to public reporting of environmental data—that expose the environmental behavior of organizations and individuals to the public creating either a legal obligation to improve environmental behavior or a stronger sense of responsibility to better manage activities that have environmental impacts.

Although enforcement and compliance assistance (principally compliance education and technical assistance) programs are key aspects of our nation’s environmental laws, it has been clear for several years that these programs *by themselves* cannot assure the kind of outcomes needed to ensure full implementation of our environmental laws. There are simply too many activities, engaged in by too many people, at too many scales (local, regional, national, and international) to rely on enforcement and compliance programs as the sole or even the principle tool for holding regulated parties accountable for their environmental behavior.¹ As a result, government agencies, environmental organizations, and others must utilize a much wider range of techniques to hold orga-

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1. ENVTL. L. INST., BEYOND ENFORCEMENT: ENFORCEMENT, COMPLIANCE ASSISTANCE, AND CORPORATE LEADERSHIP PROGRAMS IN FIVE MIDWESTERN STATES 9-12 (2003) [hereinafter BEYOND ENFORCEMENT].

nizations accountable for their environmental behavior. The opportunity for the public to participate in environmental permit proceedings could be an important element of environmental accountability but, unfortunately, most existing public participation techniques do little to enhance accountability. Earlier, more interactive and more “authentic” public participation is a critical aspect of strengthening environmental accountability and assuring better environmental outcomes.

Context

This country has built a massive environmental regulatory system over the last thirty-plus years that has relied heavily on enforcement to hold regulated entities accountable for their environmental behavior and to ensure adherence to the laws adopted at the federal, state, and local level.² This deterrence approach is premised on the idea that “decisions regarding compliance are based on self-interest; businesses comply when the costs of non-compliance outweigh the benefits of noncompliance.”³ As Michael Stahl, a senior Environmental Protection Agency (EPA) official, observed:

The traditional strategy of regulated compliance programs has been to create and maintain a presence in the regulated universe, which could identify and correct violations and deter others from violating laws and regulations. This strategy viewed complete coverage of the regulated universe and uniform enforcement of the law as overarching goals.⁴

However, as the number of environmental laws expanded it became obvious that a “full coverage” model for enforcement was not possible, even if it were desirable. No environmental agency has the enforcement resources to implement the full coverage model across the entire regulated universe.⁵

Because of the limitations of the full coverage model, environmental agencies have increasingly turned to more collaborative methods of assuring compliance, first focusing on compliance education aimed at helping regulated parties better understand what they needed to do to comply and technical assistance programs

2. See CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP* 59-67 (2003).

3. *Id.* at 60.

4. Michael Stahl, *Beyond the Bean Count: Measuring Performance of Regulatory Compliance Programs*, 28 *THE PUBLIC MANAGER* 31 (1999).

5. *BEYOND ENFORCEMENT*, *supra* note 1, at 10.

that gave regulated parties the technical knowledge to comply. More recently, government agencies have developed a series of voluntary programs designed to encourage voluntary compliance, such as the U.S. Environmental Protection Agency's environmental audit program that provides penalty waivers in cases where a regulated entity establishes an environmental management system, conducts periodic environmental audits, and promptly reports and corrects any violations identified in the audit.⁶ EPA programs like Project XL⁷ ("excellence and leadership") and its Performance Track⁸ endeavor to encourage compliance and beyond compliance behavior through establishing environmental goals, better public reporting, expanded public participation, and the use of environmental management systems in return for a more flexible approach to regulation. These "cooperative-based" approaches are premised on a different view of behavior than the deterrence model. Cooperative-based compliance rests on the view that corporations are not solely economic actors interested in maximizing profits, but that they are also influenced by civic and social motives, and generally inclined to comply with the law.⁹

In reality, most enforcers use a hybrid strategy that includes elements of both coercion and cooperation.¹⁰ Government enforcers and others have increasingly realized that motivations beyond coercion resulting from enforcement through the regulatory system must be used to achieve compliance. They have begun to see that values (both organizational and individual) and economics (both incentives and disincentives) may play an important role in driving compliance. This understanding has resulted in a broad range of new environmental programs (some mandatory, others voluntary) that have emphasized the collection and dissemination of data. This data becomes the basis for educating both the public and regulated entities themselves about the extent of emissions and the impact those discharges have on the environment. Better information is the seedbed for evolving environmental values.

6. Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, 65 Fed. Reg. 19,618 (EPA revised policy Apr. 11, 2000).

7. See EPA, *Project XL*, at <http://www.epa.gov/projectxl> (last updated Jan. 29, 2004).

8. See EPA, *National Environmental Performance Track*, at <http://www.epa.gov/performancectrack> (last updated Jan. 29, 2004).

9. RECHTSCHAFFEN & MARKELL, *supra* note 2, at 67; BEYOND ENFORCEMENT, *supra* note 1, at 13.

10. RECHTSCHAFFEN & MARKELL, *supra* note 2, at 81.

Similarly, the country has turned more often to economic mechanisms to drive environmental behavior because well-designed economic instruments can more efficiently allocate the cost of regulation and because properly designed economic instruments can take advantage of the imbedded motivation to make or save money by applying entrepreneurial skills. The sulfur dioxide cap and trade program designed to deal with acid rain issues under Title IV of the Clean Air Act¹¹ provides a classic example of this approach. The Act places a cap on emissions of sulfur dioxide from electric power generating facilities and allocates the permitted level of emissions among all of the regulated plants based on a formula developed by Congress.¹² The facility owners are then free to buy or trade emission allowances so long as they hold one allowance for each ton of sulfur dioxide emitted in a calendar year. This allows facilities that can efficiently reduce emissions to make or save money by reducing emissions and selling allowances to others for whom the cost of emissions reduction is higher.

The trading program stimulated significant innovation in the way that power plant emissions are controlled and constrained emissions below the required cap. This was accomplished without any significant enforcement because of the combination of the economic incentives for reducing emissions, the requirement for continuous emissions monitoring for all stacks and substantial automatic penalties if a utility does not hold one allowance for each ton of emissions generated during the year.¹³

A Systematic Approach to Environmental Accountability

As environmental issues and programs have become more pervasive and complex, government agencies, non-governmental organizations (NGOs), and corporations themselves have developed a wide range of mechanisms to increase awareness about environmental activities and stimulate improved performance, at least in part in recognition of the need to rely on a broader range of behavioral motivators beyond the regulatory system (or to avoid

11. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. §§ 7401-7700 (2000)).

12. Clean Air Act, 42 U.S.C. § 7651b (2000).

13. Byron Swift, *How Environmental Law Works: An Analysis of the Utility Sector's Response to Regulation of Nitrogen Oxides and Sulfur Dioxide Under the Clean Air Act*, 14 TUL. ENVTL. L.J. 309, 403-04 (2001).

the transactions costs associated with regulatory systems). These mechanisms include:

- Mandatory public reporting of emissions data such as discharge monitoring reports under the Clean Water Act¹⁴ and the Toxics Release Inventory under Emergency Planning and Community Right-to-Know Act.¹⁵
- Voluntary emissions data reporting under programs such as the Global Reporting Initiative¹⁶ developed by the Coalition for Environmentally Responsible Economies and the Tellus Institute, both non-governmental organizations, that encourages public reporting on environmental information about organizations using a standard reporting format.
- Government sponsored environmental leadership, voluntary emissions reduction and reporting programs such as the Environmental Protection Agency's Performance Track or the State of Michigan's "Clean Corporate Citizen" program.¹⁷
- Government policies that encourage environmental auditing, reporting violations found through the environmental audits to government agencies and prompt correction of violations in return for penalty waivers, such as the U.S. EPA's Incentives for Self-Policing and the Minnesota Environmental Improvement Act.¹⁸
- The International Standards Organization's voluntary environmental management system standard—ISO 14001—designed to encourage companies to adopt formal management systems that assess the environmental aspects of their businesses, set goals for reducing environmental impacts, train employees on how to achieve the goals and track progress in meeting the goals.¹⁹

14. See Clean Water Act, 33 U.S.C. § 1318(a)(A) (2000).

15. See Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11023 (2000).

16. See Global Reporting Initiative, at <http://www.environmentalreporting.org> (last visited Jan. 29, 2004).

17. See MICH. DEP'T OF ENVTL. QUALITY, *Clean Corporate Citizen*, at http://www.michigan.gov/deq/0,1607,%207-135-3585_3666_4134---,00.html (last visited Jan. 29, 2004).

18. MINN. STAT. §§ 114C.20–.28 (2001).

19. See INT'L ORG. FOR STANDARDIZATION, ENVIRONMENTAL MANAGEMENT: THE ISO 14000 FAMILY OF INTERNATIONAL STANDARDS (2002), available at <http://www.iso.ch/iso/en/prods-services/otherpubs/iso14000/index.html> (last visited Mar. 25, 2004).

- Public access to emissions data, often arrayed by geographic coordinates, in systems such as EPA's Envirofacts²⁰ or Window to My Environment²¹ databases and Environmental Defense's "Scorecard" database.²²
- Public access to enforcement data such as EPA's Enforcement and Compliance History Online (ECHO) database.²³
- Mandatory public involvement procedures that allow citizens to participate in permitting and enforcement decisions, including public comment periods, public meetings, and public hearings.
- Funding to provide citizens and citizen organizations with access to technical experts such as the Superfund Technical Assistance Grants (TAG) program²⁴ and EPA's Technical Outreach Services for Communities (TOSC) program.²⁵
- Government sponsored enhancements to public involvement procedures including early notice of permit applications, dispute resolution opportunities including mediation and community dialogues, and neighborhood meetings.
- Voluntary corporate sponsored community involvement opportunities such as community advisory panels.
- Voluntary corporate responsibility standards such as the CERES Principles²⁶ developed by an NGO in response to the Exxon Valdez oil spill and "Responsible Care," the self-governance code developed by the industry-based American Chemistry Council.²⁷

While each of these mechanisms is designed, at least in part, to enhance public accountability for environmental outcomes, they are rarely used in a systematic way. Each mechanism, much like

20. See EPA, *Envirofacts Data Warehouse*, at <http://www.epa.gov/enviro/index.java.html> (last updated Jan. 20, 2004).

21. See EPA, *Window to My Environment*, at <http://www.epa.gov/enviro/wme/index.html> (last updated Dec. 19, 2003).

22. See Env'tl. Def., *Scorecard*, at <http://www.scorecard.org> (last visited Jan. 29, 2004).

23. See EPA, *Enforcement & Compliance History Online*, at <http://www.epa.gov/echo> (last updated Jan. 21, 2004).

24. See EPA, *Superfund Community Involvement*, at <http://www.epa.gov/superfund/tools/tag> (last updated Dec. 30, 2003).

25. See EPA, *Region 8—Technical Outreach Services*, at http://www.epa.gov/region08/community_resources/tosc/toschome.html (last updated Oct. 28, 2003).

26. See Coalition for Environmentally Responsible Economies, *Our Work: The Cares Principles*, at http://www.ceres.org/our_work/principles.htm (last visited Jan. 29, 2004).

27. See Am. Chemistry Council, at <http://www.americanchemistry.com> (last visited Jan. 29, 2004).

each of our major environmental statutes, was developed to address a specific problem, not as an element of a comprehensive strategy to enhance public accountability in a way that would maximize environmental outcomes.

Government agencies have, in the last few years, begun to use a “systems approach” for their enforcement and compliance programs. For example, the U.S. EPA and a few states have developed compliance management systems to identify priorities, allocate resources and determine which compliance tool—education, technical assistance or enforcement—to use in any particular set of circumstances.²⁸ They are, in Professor Malcolm Sparrow’s vernacular, trying to “pick important problems and solve them”²⁹ by using a “problem-solving strategy [that] picks the most important tasks and then selects appropriate tools in each case, rather than deciding on the most important tools (technical assistance, enforcement, etc.) and picking the tasks to fit.”³⁰ However, this systems approach has not extended to the broader range of accountability mechanisms.

Using the full range of accountability tools more systematically—creating an environmental accountability system similar to, but much broader than the compliance management system now used by EPA—could significantly improve the effectiveness of environmental programs and improve environmental results. This will require government agencies, environmental organizations and others concerned with environmental progress to more carefully analyze how the various mechanisms can be linked in a strategic fashion.

One critical element of a strategic environmental accountability system is public participation in environmental decision-making. Effective public participation can bring more facts to the table, ensure more thoughtful decision-making and, through well-designed permits, increase the amount of data available to monitor compliance and reduce demands on enforcement. Unfortunately, the principal public participation methods used today by

28. See LeRoy Paddock & Suellen Keiner, *Mixing Management Metaphors: The Complexities of Introducing a Performance-based State/EPA Partnership System into an Activities-based management Culture*, in NAT’L ACAD. OF PUB. ADMIN., ENVIRONMENTGOV: TRANSFORMING ENVIRONMENTAL PROTECTION FOR THE 21ST CENTURY 11.51-11.52 (2000); BEYOND ENFORCEMENT, *supra* note 1, at 106-07 (discussing Indiana’s Compliance/Enforcement Team).

29. MALCOLM K. SPARROW, THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE 132 (2000).

30. *Id.* at 131.

federal, state and local governments often do not allow the kind of engaged participation necessary to produce the results mentioned above. The remainder of this article explores the public participation process and makes recommendations about how public participation can be reformed to become a much more effective element of environmental accountability.

Public Participation and Environmental Accountability

One of the critical tools for environmental accountability is public participation in environmental permitting and other governmental agency proceedings. Effective public participation can:

- Create pressure for a project proposer to produce more information about the environmental impacts of a project;
- Generate information about a project based on local knowledge and expertise;
- Drive modifications in a project to address environmental concerns (not infrequently related to issues such as traffic flow, noise or odors where environmental laws are typically weak or narrowly drawn);
- Create ongoing consultative relationships between the public and the facility proposer including ongoing monitoring and reporting procedures;
- Push government agencies to more carefully consider aspects of a proposed permit including its location in communities with environmental justice concerns; and
- Raise issues about past oversight of the facility or facilities owned by the project proposer.³¹

Unfortunately, the principal public participation methods used by government agencies—public hearings, public meetings, and notice and comment rulemaking procedures—frequently do not create conditions necessary for effective, or “authentic”,³² public participation and therefore fail to live up to their potential for enhancing environmental accountability.

31. See THOMAS C. BEIERLE & JERRY CAYFORD, *DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING* 14-15 (2002).

32. “Authentic” public participation “implies more than finding the right tools and techniques for increasing public involvement in public decisions.” Cheryl Simrell King et al., *The Question of Participation: Toward Authentic Public Participation in Public Administration*, 58 PUB. ADMIN. REV. 317, 317 (1998). Rather it is participation that “works for all parties and stimulates interest and investment in both administrators and citizens.” *Id.*

One study of public participation concluded that the most ineffective public participation technique is the public hearing. "Public hearings do not work. Low attendance at public hearings is often construed [by public administrators] as public apathy or silent approval of the status quo."³³ The report explained that "[i]n actuality, low attendance is more likely to be related to the structure of public hearings. Administrators recognize that the structure of public hearings and public meetings prohibits meaningful exchange. As one administrator said, 'The public hearing is not about communication, it is about convincing.'"³⁴

Another study found formal public participation processes (public hearings and public meetings) were far less successful—defined as incorporating public values into decisions, improving the substantive quality of decisions, resolving conflicts among competing interests, building trust in institutions, and educating and informing the public—than decisions reached through advisory committees or through negotiations and mediations.³⁵ Research conducted by the Environmental Law Institute revealed "communities feel their input [in U.S. Environmental Protection Agency proceedings] does not matter because EPA has already made its decision before it hears from the public."³⁶

To understand why the legally mandated methods of public participation are often not effective in engaging the public it is important to review the history and context of public participation. The growth in government agency responsibility beginning in the early twentieth century led federal and state governments to employ professional managers who became experts in the mission of their agencies. These expert managers were delegated the responsibility for making decisions on behalf of the government and the people. As Beierle and Cayford note in their book, *Democracy in Practice*, this "managerial approach" presents "[a] fundamental challenge for administrative governance" in "reconciling the need for expertise in managing administrative programs with

33. *Id.* at 323 (quoting Kathlene L. Martin & J.A. Martin, *Enhancing Citizen Participation: Panel Designs, Perspectives, and Policy Formation*, 10 J. POL'Y ANALYSIS & MGMT. 46-63 (1991)).

34. *Id.*

35. BEIERLE & CAYFORD, *supra* note 31, at 46.

36. ENVTL. L. INST., BUILDING CAPACITY TO PARTICIPATE IN ENVIRONMENTAL PROTECTION AGENCY ACTIVITIES: A NEEDS ASSESSMENT AND ANALYSIS 43 (1999) [hereinafter BUILDING CAPACITY].

the transparency and participation demanded by a democratic system.”³⁷

The rapid expansion of government during the New Deal era significantly increased the role of the executive branch of government and its expert managers.³⁸ To temper the power of expert managers who were not directly accountable to the citizenry, Congress enacted the Administrative Procedure Act (APA) in 1946³⁹ requiring federal agencies to use a rulemaking process that allowed the public to comment on proposed rules⁴⁰ and providing the public with the opportunity to request a public hearing on adjudicatory matters such as issuing permits.⁴¹

A second public participation movement occurred in the 1960s and 1970s following another expansion in the role of government programs associated with the New Society.⁴² Among other programs designed to make government more accountable to the public, Congress passed the Freedom of Information Act in 1966⁴³ giving citizens greater access to government data and the National Environmental Policy Act in 1969⁴⁴ providing for preparation and public review of environmental impact statements.⁴⁵

Although there are now a number of legal requirements related to public involvement in administrative matters, the procedures for public involvement in agency decision-making still rely on the basic APA public participation requirements enacted some 57 years ago; procedures that also serve as the model for state administrative procedural laws that require public notification only a few weeks before an agency intends to issue a permit.⁴⁶ Further, the managerial approach to government still holds sway in most cases. As one study observed:

Public participation processes have four major components: (1) the issue or situation; (2) the administrative structures, systems, and processes within which the participation takes place;

37. *Id.* at 3.

38. *Id.*

39. Administrative Procedure Act, 5 U.S.C. §§ 551-706 (2000).

40. *Id.* § 553(c) (requires that after the notice the agency must give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without the opportunity for oral presentation).

41. *Id.* § 554(a).

42. See BUILDING CAPACITY, *supra* note 36, at 1.

43. Freedom of Information Act, 5 U.S.C. § 552 (2000).

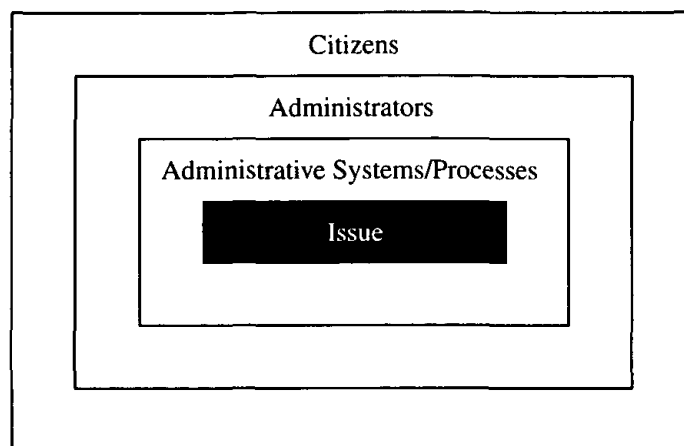
44. National Environmental Policy Act, 42 U.S.C. § 4332 (2000).

45. See BEIERLE & CAYFORD, *supra* note 31, at 4.

46. See, e.g., N.Y. A.P.A. §§ 1-601 (2003); MINN. STAT. §§ 14.001-.70 (2003).

(3) the administrators; and (4) the citizens. Participation efforts are currently framed such that these components are arrayed around the issue. The citizen is placed at the greatest distance from the issue, the administrative structures and processes are the closest, and the administrator is the agent between the structures and the citizens, as depicted in Figure 1.⁴⁷

Figure 1: Context of Conventional Participation:⁴⁸



The inherent clash between the managerial model for government and the principal of representative democracy remains but citizens are increasingly reluctant to defer to expert administrators.⁴⁹ Instead, as part of a broader movement toward “popular” democracy, citizens increasingly want earlier access to the decision-making process, more opportunities to be heard and to bring local knowledge to the table, and a clearer role in decision-making.⁵⁰

This approach calls for authentic public participation that

Places the citizen next to the issue and the administrative structures and processes furthest away. However, the administrator is still the bridge between the two, as depicted in Figure 2. Citizens are central and directly related to the issue; they have an immediate and equal opportunity to influence the processes and the outcomes. The administrators’ influence comes from their relationship with the citizenry as well as from their expertise and position.⁵¹

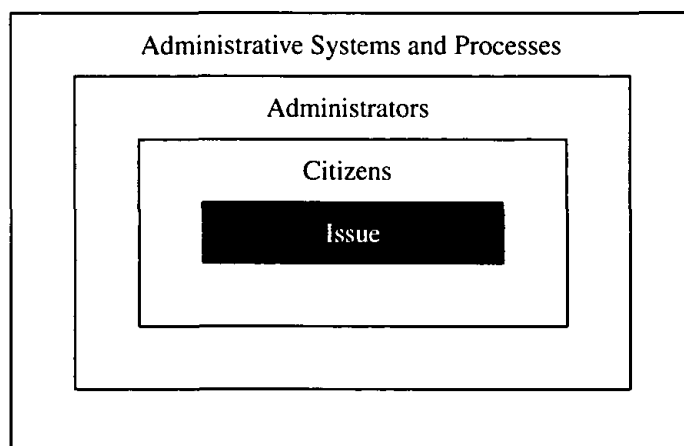
47. King et al., *supra* note 32, at 319-20.

48. *Id.* at 320.

49. BUILDING CAPACITY, *supra* note 36, at 2.

50. See BEIERLE & CAYFORD, *supra* note 31, at 4; see also Paul Slovic, *Perceived Risk, Trust, and Democracy*, 13 RISK ANALYSIS 675, 680 (1993).

51. King et al., *supra* note 32, at 321.

Figure 2: Context of Authentic Participation:⁵²

Even though the public wants a more democratic form of participation, the real world practices remain closer to the older managerial model.

Although there is theoretical and practical recognition that the public must be more involved in public decisions, many administrators are, at best, ambivalent about public involvement or, at worst, they find it problematic. . . . As a result, although many public administrators view close relationships with citizens as both necessary and desirable, most of them do not actively seek public involvement. If they do seek it, they do not use public input in making administrative decisions (as indicated by a 1989 study conducted by the Kettering Foundation). These administrators believe that greater citizen participation creates delays and increases red tape.⁵³

In most cases, state and federal environmental laws do not compel or even encourage greater public involvement than the basic APA requirements. EPA and a few states have begun to develop new, more inclusive and interactive approaches to public participation. However, much of the public participation in environmental permitting and other environmental agency decision-making at both the federal and state levels still use the basic APA procedures, relies on managerial expertise, cannot be said to be “authentic” and does not serve as an effective form of environmental accountability. This situation is surprising in light of the clarion call for broader, earlier, and more participatory public involvement that has grown steadily for the past decade or more.

52. *Id.*

53. *Id.* at 319.

The Call for Earlier and More Effective Public Participation

Since the early 1990s a broad array of studies, policy recommendations, and international agreements have called for expanded opportunities for the public to participate in environmental decision-making.

- Principle 10 of the United Nation's Agenda 21 resulting from the United Nations Conference on Environment and Development (often referred to as the "Earth Summit") held in Rio de Janeiro provides:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.⁵⁴

- Based on Agenda 21, the International Union for the Conservation of Nature and Natural Resources (IUCN) and the International Council of Environmental Law prepared a Draft International Covenant on Environment and Development designed to serve as a generally agreed upon set of fundamental principles regarding the environment and development. Article 12 of the Covenant asserts, "All persons, without being required to prove an interest, have the right to seek, receive, and disseminate information on activities or measures adversely affecting or likely to affect the environment and the right to participate in relevant decision-making processes."⁵⁵
- The United States responded to the Earth Summit in the mid-1990s through President Clinton's Council on Sustainable Development (PCSD). The PCSD was a consensus process involving stakeholders from business, federal, state, and local government, environmental and environmental justice organizations, and other groups. Special task forces were established to provide in depth review of key issues. The Sustainable Communities Task Force Report of the President's Council fo-

54. *Report of the U.N. Conference on Environment & Development, Rio Declaration on Environment and Development*, U.N. GAOR Annex 1, Principle 10, U.N. Doc. A/CONF.151/26 (vol. 1) (1992).

55. THE WORLD CONSERVATION UNION, INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT 4 (1995).

cused on public participation observing “[T]he fundamentals of sustainable communities are based in process—how people work together to build community, what information they can access, who is involved in making decisions, and how well communities work cooperatively to address shared problems that transcend their borders.”⁵⁶ The Report found “Lasting solutions [to environmental problems] are best identified when people from every part of a community—business, citizens, economic development and environmental groups, elected officials, civic organizations, religious institutions, and so forth—are brought together in a spirit of cooperation and respect to identify solutions to community problems.”⁵⁷ The Report reinforces the point raised by Beierle and Cayford in *Democracy in Practice* about the need to shift away from the managerial paradigm in public administration. “This rejuvenated style of community-based strategic planning is expanding the concept of planning. While still relying on the expertise of professional planners, it also recognizes the great value of involving everyday people.”⁵⁸

The Sustainable Communities Task Force Report goes on to note:

True participation means giving people the opportunity to take part in the initial phases of planning, not just the ratifying decisions that have already been made, or commenting on plans that have been drafted. While it is time-consuming and may not be possible in every situation, this model of decisionmaking should be encouraged. It will add legitimacy to the democratic process about which so many Americans are cynical, and it can lead to decisions that are more likely to be embraced by more people in the community.⁵⁹

The Report also links public participation to the then emerging issue of environmental justice. The Report observed, “An important component of environmental justice is the right of local residents to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement, and evaluation.”⁶⁰

56. THE PRESIDENT’S COUNCIL ON SUSTAINABLE DEVELOPMENT, SUSTAINABLE COMMUNITIES TASK FORCE REPORT 13 (1997).

57. *Id.* at 14.

58. *Id.*

59. *Id.* at 15.

60. *Id.* at 16.

- The recommendations of the Sustainable Communities Task Force are reflected in one of the fundamental beliefs that underpin the final report of the President's Council on Sustainable Development: "We need a new *collaborative* decision process that leads to better decisions; more rapid change; and more sensible use of human, natural, and financial resources in achieving our [environment and development] goals."⁶¹ The final report went on to conclude, "Our most important finding is the potential power of and growing desire for decision processes that promote direct and meaningful interaction involving people in decisions that affect them."⁶²
- In 1993 the Aspen Institute launched a three-year multi-stakeholder dialogue with the goal of developing an improved environmental management system for the country. Among the principles identified through the dialogue that must form the foundation of any new environmental management system are "inclusive, democratic and stakeholder participatory processes."⁶³ This principle is reflected in detailed "considerations" about how stakeholder processes should be constructed to "enhance public participation; enrich the information basis for effective decision making; ensure greater accountability to workers and the community; ensure the ownership necessary for decisions to be honored and implemented; and sustain the democratic principles of our society."⁶⁴ Among these considerations are drawing stakeholders from a wide base of community members, convening the process as early as possible to enable stakeholders to have a real impact on the design of the project or policy, and full transparency of both information and process.⁶⁵
- In 1998, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("Aarhus Convention") was completed and has since been signed by thirty-nine countries and the European Union. The Aarhus Convention links environmental

61. THE PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, *SUSTAINABLE AMERICA: A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY AND A HEALTHY ENVIRONMENT FOR THE FUTURE* vi (1996) (emphasis added).

62. *Id.* at 7.

63. THE ASPEN INST. PROGRAM ON ENERGY, THE ENV'T, AND THE ECONOMY, *THE ALTERNATIVE PATH: A CLEANER, CHEAPER WAY TO PROTECT AND ENHANCE THE ENVIRONMENT* 6 (1996).

64. *Id.* at 19.

65. *Id.* at 20-21.

rights and human rights for the first time.⁶⁶ Among other things, Article 6 of the Aarhus Convention provides:

- “Each Party shall provide for early public participation, when all options are open and effective public participation can take place.”⁶⁷
- “Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.”⁶⁸
- “Each party shall ensure that in the decision due account is taken of the outcome of the public participation.”⁶⁹
- In 1999, the Environmental Law Institute conducted a study for the U.S. Environmental Protection Agency involving over thirty experts in public participation. That study found that a collaborative approach that would establish relationships with community members that do not relegate them to commenting on proposed actions but, instead, provide a role for community stakeholders in developing proposals and negotiating agreements with regulated entities might address concerns that “many processes currently used for public participation are outdated and that new paradigms are needed to provide a more integral and meaningful role for stakeholders.”⁷⁰
- EPA’s National Environmental Justice Advisory Council has also examined the issue of public participation in permitting. The Council’s report noted that:

Non-Agency stakeholders agree that one of the most serious—and easily remedied flaws—in current permitting is the way environmental agencies fail to engage the public in permit decision-making. The issue is a key one because inadequate public comment processes generate community mistrust, delay or disrupt industry plans, and impair agency decision-making.⁷¹

66. See ECON. COMM’N FOR EUROPE, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 1 (2000), available at <http://www.unece.org/env/pp/acig.pdf>; see also CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (1998), available at <http://www.unece.org/env/pp/documents/cep43e.pdf> [hereinafter AARHUS CONVENTION].

67. AARHUS CONVENTION, *supra* note 66, at art. 6 ¶ 4.

68. *Id.* art. 6 ¶ 5.

69. *Id.* art. 6 ¶ 7.

70. BUILDING CAPACITY, *supra* note 36, at 30-31.

71. National Environmental Justice Advisory Council, *Environmental Justice in the Permitting Process: A Report from the Public Meeting on Environmental Permitting Convened by the National Environmental Justice Advisory Council—Arlington*

- In Minnesota, a detailed generic environmental impact statement addressing the issue of concentrated animal feeding operations examined the issue of public participation in feedlot permits and found

[C]itizens were often very uncomfortable with the formal means of public involvement surrounding state and local permits and believed that these involvement opportunities came too late in the development of the project to have much affect in the outcome. . . . They uniformly supported the idea of a more informal, earlier dialogue with the regulatory agency and the producer as a way of addressing issues and building a consensus on approval of a facility.⁷²

- Finally, the National Academy of Public Administration has recognized the inadequacies of current public participation approaches. In a 2001 study, the Academy observed:

EPA's air, water, and RCRA [Resource Conservation and Recovery Act] permit programs provide formal opportunities for public participation. However, they usually occur late in the permitting process when most projects have been fully shaped, and when facility and EPA staff has reached an agreement on permit conditions or changes to the original proposals. This late participation significantly limits the community's ability to influence the permit and analyze the project's potential effects. Moreover, because the public was not involved in the earlier stages, it may tend to view the permit applicant and EPA as allies. As a result, the community is more likely to challenge the permit and create costly, time-consuming delays, not believing that EPA would address legitimate concerns. Although formal public comment processes are necessary and useful, they currently are too late and limited in many cases to provide EPA with an opportunity to address concerns appropriately.⁷³

Based on this finding, the Academy recommended that EPA "adopt early notice procedures for communities once permit

Virginia, November 30-December 2, 1999, EPA/300-R-00-004, at 17 (2000), available at http://www.epa.gov/compliance/resources/publications/ej/permit_recom_report_0700.pdf (citations omitted) [hereinafter ADVISORY COUNCIL].

72. DECKER PLANNING & RESEARCH ET AL., TECHNICAL WORK PAPER: ROLE OF GOVERNMENT FOR THE GENERIC ENVIRONMENTAL IMPACT STATEMENT ON ANIMAL AGRICULTURE IN MINNESOTA 103 (2001).

73. NAT'L ACAD. OF PUB. ADMIN., ENVIRONMENTAL JUSTICE IN EPA PERMITTING: REDUCING POLLUTION IN HIGH-RISK COMMUNITIES IS INTEGRAL TO THE AGENCY'S MISSION 63-64 (2001) [hereinafter ENVIRONMENTAL JUSTICE].

applications are complete, providing the name of an agency community liaison and soliciting comments prior to negotiating the permit terms and conditions.”⁷⁴

Some Progress, but. . .

EPA has enacted a number of reforms in its approach to public participation and some states have implemented a few early and more interactive participation programs based more on the model suggested in Figure Two above. For example, EPA has adopted public participation rules that require early notice for Resource Conservation and Recovery Act permits.⁷⁵ The Agency has also recently adopted a public participation policy that encourages earlier and more interactive public participation programs.⁷⁶ EPA experimented with a more open public participation process in its signature regulatory innovation program, Project XL,⁷⁷ in the late 1990s convening community stakeholders groups for all XL projects.⁷⁸ The Agency also utilized stakeholder groups in its Common Sense Initiative, an innovations program that focused on redesigning regulatory programs in specific sectors including the automotive, metal plating and electronics sectors.⁷⁹ EPA’s recently adopted public participation policy encourages agency staff to notify the public early in the permitting process, engage them in the process through a number of techniques including dialogues and formal dispute resolution, and ensure that community concerns are accounted for in the final agency decision.⁸⁰ And, EPA is the lead agency for a new “E-Rulemaking” initiative developed by the federal Office of Management and Budget that allows citizens

74. *Id.* at 75.

75. Resource Conservation and Recovery Act, 42 U.S.C. § 6925 (2000).

76. See OFFICE OF POLICY, ECONOMICS, AND INNOVATION, EPA, PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY (2003), available at <http://www.epa.gov/publicinvolvement/policy2003/policy2003.pdf> [hereinafter PUBLIC INVOLVEMENT POLICY].

77. See EPA, *Project XL*, at <http://www.epa.gov/projectxl/> (last updated Oct. 7, 2003).

78. OFFICE OF REINVENTION, EPA, PROJECT XL STAKEHOLDER INVOLVEMENT: A GUIDE FOR PROJECT SPONSORS AND STAKEHOLDERS (1999), at <http://www.epa.gov/projectxl/guidexl.htm> (last updated Apr. 25, 2002).

79. See EPA, *U.S. Automobile Assembly Plants and Their Communities: About the Common Sense Initiative*, at <http://www.epa.gov/air/opar/auto/csi.html> (last updated Oct. 15, 2003).

80. See PUBLIC INVOLVEMENT POLICY, *supra* note 76, at 2-3.

to search for, view, and comment on proposed rules over the internet.⁸¹

A few states have also enacted laws that require earlier public notification in permit cases. For example, in Texas, state law requires the public to be notified of air pollution permit applications as soon as an application is complete rather than the more typical situation where notice is only provided at the point where a draft permit has been prepared by the agency.⁸² The experience in Texas has been that permit writers received many more inquiries about permit applications when the timing of the notification was moved from the date a draft permit was ready to the date an application submitted to the agency was complete.⁸³ The Illinois Environmental Protection Agency occasionally uses “living room” public hearings; small, informal sessions that engage members of the public who might otherwise feel uncomfortable participating in a regular public hearing.⁸⁴ Other local governments have begun to employ collaborative processes early in the decision-making process to ensure community concerns are considered.⁸⁵ And, the Wisconsin Department of Natural Resources used an internet survey instrument to solicit comments on its strategic plan.⁸⁶

These efforts remain the exception, not the rule. It is past time that the federal, state, and local governments adopt a new paradigm for public participation in environmental decision-making that ensures authentic participation and allows public participation to play a much stronger role in environmental accountability.

Recommendations

1. Government agencies should carefully review their statutory authority to determine the level of discretion they have to involve the public early in permitting processes and to use a broader range of public participation methods and to deter-

81. See EPA Newsroom, *EPA Selected by OMB as Lead Agency on New E-Rulemaking Initiative* (Jan. 23, 2003), at http://www.epa.gov/newsroom/headline_012403.htm (last updated Jan. 16, 2004).

82. TEX. ADMIN. CODE § 116.131 (2004).

83. ENVIRONMENTAL JUSTICE, *supra* note 73, at 64.

84. See NAT'L ACAD. OF PUB. ADMIN., ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING AND ZONING 22-23 (2003) [hereinafter ADDRESSING COMMUNITY CONCERNS].

85. *Id.* at 22-23.

86. Paddock & Keiner, *supra* note 28, at 11.59.

mine whether their statutory authority needs to be amended if it unduly constricts public participation options.⁸⁷

2. Governmental agencies at all levels should recognize the severe limitations of the traditional public hearing, public meeting, and notice and comment procedures. While these procedures may need to be retained to preserve legal rights of individuals, they should at the very least be combined with other methods of public participation that allow more direct interaction among the citizens, government agencies, project proposers, and advocacy organizations early in the development of a proposed project.
3. Notice of a proposed project should routinely be provided to the public as soon as a government agency has sufficient information to clearly define the nature and extent of the proposed project. To ensure that agencies provide early notice, federal, state, and local laws should be amended to require early public notice of proposed projects.
4. State and local governments should consider adopting public participation policies that are similar to the new public participation policy adopted by EPA, and EPA should ensure that its new public participation policy is fully implemented across all of its programs.⁸⁸
5. For larger projects, a public participation plan may be needed to ensure that the appropriate public participation methods are used and that the human and financial resources are available for the project.⁸⁹
6. Government agencies should encourage project proposers to notify affected communities, and project proposers on their own initiative should consider notifying affected communities about proposed projects even before the projects are submitted to the government agency for review and holding preliminary discussions with the community to understand their concerns about the project.⁹⁰
7. Government agencies should set aside sufficient resources to assure that adequate information can be made available to the public about proposed projects, agency staff including

87. See BUILDING CAPACITY, *supra* note 36, at 50; see also ADVISORY COUNCIL, *supra* note 71, at 9-16.

88. See ADVISORY COUNCIL, *supra* note 71, at 19; see also BUILDING CAPACITY, *supra* note 36, at 50.

89. See BUILDING CAPACITY, *supra* note 36, at 50.

90. See AARHUS CONVENTION, *supra* note 66, at art. 6 ¶ 5; see also ENVIRONMENTAL JUSTICE, *supra* note 73, at 75.

permit writers can regularly interact with members of the public, meetings can be held at times and in places that are convenient for the public to attend, third party neutrals can be used in cases where third parties are needed to facilitate an effective dialogue among the parties, and communities have access to technical expertise when needed.⁹¹

8. Government agency staff that work with the public should receive in depth training on methods for effectively involving the public, the importance of taking "local knowledge" into account in their decisions, and how to use their expertise in a way that enables rather than deters public participation.⁹²
9. Government agency administrators should develop public participation decision trees for their staff that allow the staff to rapidly analyze which public participation technique would likely be most effective in different situations.⁹³
10. Government agencies and project proposers should expand the use of collaborative decision-making processes.
11. Information related to a proposed project, including historical information about related facilities and the facility operator, should be readily available to the public on the internet or at local institutions such as libraries so that members of the public have the information needed to effectively participate.⁹⁴ Government agencies should also continue exploring expanded use of technology including the internet as a way of providing better public access to the decision-making process.
12. Government agencies should consider establishing ongoing relationships with some communities in which environmental permits are frequently issued or are routinely controversial based on the federal Superfund program's community liaison model. This is especially important for communities that have traditionally been under represented where environmental justice is a central concern.⁹⁵
13. Government agencies should provide training programs for citizens and citizen organizations that help them better understand the permitting process and how to most effectively

91. See ENVIRONMENTAL JUSTICE, *supra* note 73, at 75.

92. See King et al., *supra* note 32, at 325; see also NAT'L ACAD. OF PUB. ADMIN., MODELS FOR CHANGE: EFFORTS BY FOUR STATES TO ADDRESS ENVIRONMENTAL JUSTICE 135 (June 2002); ENVIRONMENTAL JUSTICE, *supra* note 73, at 75.

93. See ENVIRONMENTAL JUSTICE, *supra* note 73, at 75.

94. See *id.*

95. See *id.*

participate in the process. By providing more accessible methods of public participation than the formal public meeting and public hearing processes, this training process should be simplified for government agencies.⁹⁶

14. Government agencies must clearly reflect in their decisions how the information provided by the public was considered in their final decisions or, if it was not considered, why the information was not relevant to the decision.
15. Government agencies, environmental organizations, and other interested organizations should consider how to strategically integrate improved public participation programs into a systematic approach to environmental accountability that helps assure environmental progress.

96. See BUILDING CAPACITY, *supra* note 36, at 56; ADDRESSING COMMUNITY CONCERNS, *supra* note 84, at 22.